**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 8**

**AT & T MOBILITY SERVICES, LLC** [1]

**Employer/Petitioner**

**CASE 08-UC-250707**

**and**

**COMMUNICATIONS WORKERS OF AMERICA**

**Union**

# DECISION AND ORDER

Upon a petition filed pursuant to Section 9(b) of the National Labor Relations Act (the Act), as amended, a hearing was held before a hearing officer of the National Labor Relations Board (Board) to determine whether it was appropriate to clarify the existing bargaining unit as set forth in the Employer's petition. Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. [2]

## SUMMARY

AT&T Mobility Services, LLC (Petitioner, Employer or Mobility) is engaged in wireless telecommunications and operates retail stores on a nationwide basis. Mobility and the

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[1] The name of the Employer was amended at hearing.

[2] The parties have filed briefs which have been duly considered. Based on the entire record in this proceeding, I find:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
b. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction.
c. The parties stipulated and I find that the Union is a labor organization within the meaning of the Act.

Communications Workers of America (Union or CWA) are parties to four separate collective bargaining agreements covering approximately 35,000 employees, identified as the "Orange", "Black", "Green" and "Purple" collective bargaining agreements. This proceeding involves only the Orange collective bargaining agreement (Orange CBA), which covers approximately 15,565 employees generally working in three categories: retail store employees, call center employees, and network technicians. The Employer seeks to clarify the unit to exclude approximately 1,450 employees classified as Integrated Solutions Consultant (ISC) and 150 employees classified as Integrated Sales Support Specialist (ISSS) within its newly created In Home Expert (IHX) organization [3] from the existing bargaining unit in the Orange CBA. [4]

The Employer argues that the ISC and ISSS titles should be excluded because: 1) they are a separate appropriate unit and do not share an overwhelming community of interest with employees in the existing Orange bargaining unit; and 2) they perform duties as outside sales employees, and therefore are excluded based on the Orange CBA's express language and the parties' historical exclusion of outside sales positions. [5] The Employer further maintains that

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[3] Also referred to as In-Home Solutions organization or department.

[4] The parties stipulated that the ISC and ISSS are not included or excluded from the Orange CBA. Throughout the testimony, ISC employees are sometimes referred to as In-Home Experts (experts or IHX). The Union also refers to ISSS employees as SSL employees.

[5] Throughout the hearing, the Employer presented some testimony in support of its alternative argument that ISSS employees are supervisory employees within the meaning of Section 2(11) of the Act and accordingly should be excluded from the unit on that basis. The Employer's brief did not address this argument. In its brief, the Union argues that ISSS employees do not possess supervisory authority as defined in the Act. It is well settled that the burden of establishing supervisory status rests on the party asserting that status. <u>NLRB v. Kentucky River Community Care</u>, 532 U.S. 706, 711–712 (2001); <u>Oakwood Healthcare, Inc.</u>, 348 NLRB 686 (2006). There was some evidence of ISSS employees directing ISC employees. However, an individual will be found to have the authority to responsibly direct other employees only if the individual is held accountable for the performance of the tasks by the other employees. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly. <u>Oakwood Healthcare, Inc.,</u> 348 NLRB at 692 (2006). Here, the record does not provide evidence that ISSS employees are held responsible for any discretion they exercise relative to assignments or direction. Nor does the record demonstrate assignment authority in the statutory sense. Moreover, the ISSS job description specifically notes that the job is non-supervisory and that employees work on

unit clarification is necessary to prevent an inconsistent arbitration decision, as the Union filed a grievance on July 27, 2017 claiming that the ISC and ISSS titles were covered by the current Orange CBA. The parties stipulated that an arbitration hearing on the grievance was scheduled for November 5-8, 2019 and that the hearing was cancelled pursuant to the Employer's request, based on the Employer's position that the arbitrator lacked jurisdiction to decide the representational issue presented by the grievance.

The Union, relying on Premcor, Inc, 333 NLRB 1365 (2001) and Developmental Disabilities Institute, Inc., 334 NLRB 1166 (2001), argues that the Orange CBA should be clarified to include the ISSS and ISC job classifications as the employees perform the same basic functions historically performed by bargaining unit employees. The Union further argues that even assuming the ISC and ISSS employees are not included in the Orange unit, the Union must be recognized as the representative of the ISC and ISSS employees in a separate unit because more than 50 percent of the employees were transferred into the unit from the Orange unit as of August 1, 2017, the date when a substantial and representative complement existed.

I find that the Orange bargaining unit must be clarified to exclude the ISC and ISSS positions. I conclude that employees in these positions within the IHX organization are a separate appropriate unit and perform duties related to outside sales excluded by the Orange CBA and the parties' historical treatment. I find that the ISC and ISSS employees do not share an overwhelming community of interest with employees in the existing Orange collective bargaining unit. In consideration of the Union's grievance, I find clarification is necessary in

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problems with a limited scope and undergo ongoing supervision. The Board has noted its duty not to construe the statutory language of Section 2(11) too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. St. Francis Medical Center West, 323 NLRB 1046 (1947), Hydro Conduit Corp., 254 NLRB 433, 437 (1981). I find that the Employer has not met its burden of establishing that the ISSS employees are supervisors within the meaning of the Act.

order to prevent an inconsistent arbitration decision on the issue of the placement of ISC and ISSS employees. [6] Regarding the Union's alternative argument that I find that the Union is the collective bargaining representative of the ISC and ISSS employees in a separate unit, I find that the facts of this case do not support the Union's position.

## FACTS

### A. Background

The units included in the "Orange," "Black," "Green" and "Purple" collective bargaining agreements were voluntarily recognized through various neutrality and card check recognition agreements. The four separate agreements cover different regions of the country. The Orange CBA covers approximately 15,565 employees in 36 states across the northern continental United States and the District of Columbia. The Black CBA covers employees in nine Southeastern states, the Purple CBA covers employees in five Southwestern states, and the Green CBA covers Puerto Rico.

The job titles included in the Orange bargaining unit are listed in Appendix A of the Orange CBA. [7] The record reflects that the only unit positions listed in Appendix A that the Union contends the ISC and ISSS positions share functions and/or a community of interest with are the Retail Sales Consultants and COS Sales Advocates. The parties stipulated that the

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[6] Where a party utilizes a contractual means to resolve a unit placement dispute, the Board will consider a unit clarification petition regardless of when in the bargaining cycle the petition was filed. Ziegler, Inc., 333 NLRB 949, 949 (2001), distinguishing Bethlehem Steel Corp., 329 NLRB 243 (1999). In doing so, the Board reasoned such matters are not appropriate for arbitration and emphasized its exclusive autonomy to determine "questions regarding representation, accretion and unit placement." Ziegler, Inc., supra, at 949. The Ziegler exception applies even if there is only a pending grievance and not an arbitration award, "since…a pending grievance…could ultimately result in an incongruous arbitration award." Ziegler, Inc., supra, at 950.

[7] The parties stipulated that the Small Biz Advisor I job title was never populated within the contract. In addition, the parties stipulated that the Business Support Specialist, Sales Specialist, and Sales Representative job titles have been vacated.

position of COS Sales Advocate, which has been used in the Cricket Wireless stores, is the equivalent position to the Retail Sales Consultant and are “essentially one and the same.”[8]

Within the footprint of the Orange CBA, the Employer operates close to 1300 Company owned retail stores (COR retail stores). Retail Sales Consultant (RSC) employees work within the stores. Employees referred to as Sales Support Representatives (SSR) formally worked in the COR retail stores. The testimony revealed that in 2018, the parties negotiated over the elimination of the SSR position and agreed to move their duties to RSCs.

The Employer and the Union are parties to a “Memorandum of Agreement Regarding Voluntary Recognition” which established procedures for the Union to organize employees through a card-check procedure (Orange VRN). The terms of the Orange VRN run concurrently with the Orange CBA time frame. Paragraph 2C of the Orange VRN provides that because outside sales employees are excluded under the Orange contract, they are not subject to voluntary recognition through the card-check procedure.[9] The Orange CBA excludes all “Outside Premise Sales Representatives.”[10]

Mobility and its predecessors utilized other non-represented forums to sell its wireless products. These included: Authorized Retailers (non-COR retail stores operated by third parties); Authorized Dealers (national retailers including Best Buy, Walmart and other entities); Call Centers operated by third party vendors; Direct Mail sales; on-line sales; door-to-door sales and non-represented “Account Executives” selling to businesses, governmental entities and

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[8] Transcript 1203.

[9] The parties are similarly signatory to Voluntary Recognition Agreements (VRN) covering the Black, Purple, and Green CBAs. The Black and Green CBAs and VRNs expressly exclude outside sales employees from the bargaining unit. The Purple CBA and its VRN do not exclude outside sales.

[10] As will be addressed below, the Union argues that the recognition language refers only to an “outside sales” title formerly used by the Employer’s predecessor Cellular One. However, the record did not support this claim.

educational institutions. According to the Employer, apart from the COR retail stores and internal call centers, none of the above sales channels have been represented by any labor organization.

### B. <u>Creation of AT&T Mobility Home Solutions Department</u>

In July 2015, Mobility acquired DirecTV (DTV), an entity providing satellite and entertainment services. At the time DTV was acquired, it had 25 million subscribers, 20 million of whom had a wireless provider other than Mobility. According to Employer testimony, on August 1, 2017, after a largely unsuccessful marketing effort to convert these 20 million customers to Mobility, it launched nationally a new sales organization referred to as "in home experts" or "IHX" which included the ISC and ISSS job titles at issue in this proceeding.[11] The purpose of this new sales organization was to send ISC employees to the homes of DTV customers during DirecTV installation or service to convert wireless customers from T-Mobile, Sprint, or Verizon to Mobility.[12] The Employer described IHX as a "stand alone business and sales channel," apart from Mobility's retail sales organization. IHX focused on a new base of potential customers, specifically residential customers who had purchased DirecTV but were not current customers of Mobility. According to the Employer, IHX has a separate business plan, management, employees, equipment, systems, inventory, and operating budget.[13] As sales occur in customers' homes, IHX employees, unlike employees working in the COR retail stores, are subject to specific federal, state and local laws related to sales at residences.

[11] Prior to the national launch, smaller trials occurred in late 2016 and early 2017.

[12] The parties have stipulated that Mobility does not employ the technicians who install or service satellite television.

[13] While all of Mobility's sales channels use the same point of sales system (OPUS), each sales channel has unique settings.

When the IHX business was nationally launched in August 2017, there were multiple teams, each assigned to a Hub office. Hubs are located in various Employer facilities, including corporate office buildings, technician garages, former device support centers, and certain retail store locations. The Employer provided testimony that Hubs located in the same building as a retail store have separate work areas for the retail and IHX employees; thus they do not share work areas.

Each team reports to an Integrated Solutions Manager (ISM) and generally included 8-12 ISC employees and one ISSS. As of July 31, 2017, the total number of ISCs and ISSSs was 569. Of the 569, approximately 307 who were hired had previously worked in Orange bargaining unit positions. There were 17, 928 employees covered under the Orange bargaining unit as of August 1, 2017. As of October 31, 2019, the total number of ISCs and ISSSs working in the footprint of the Orange CBA was 1,587. Of the 1,587, only 417 had previously worked in the Orange unit.

While the Union maintains that various bargaining unit employees transferred to the IHX organization, the Employer contends that there were no automatic transfers and that former bargaining unit employees received no hiring preference. Employer Human Resources Business Partner Jane Marie Best testified that applicants for the new IHX organization positions applied for vacancies posted on the Employer's application process platform referred to as "Career Path." She further testified that the applications were reviewed by each ISM who then interviewed and selected candidates. According to Best, ISCs were notified that offers were contingent on a motor vehicle review.

C. **<u>The Job Functions of the Newly Created ISC and ISSS Employees</u>**

As detailed above, the Union argues that the ISC and ISSS employees perform the same basic functions historically performed by bargaining unit employees employed as RSCs and COS Sales Advocates.

ISC employees, as guided by ISSS employees, arrive unannounced and uninvited at the residential homes in which a DirecTV technician is providing installation and other services. If invited into the customer's home, the ISC provides a company-described "white glove" experience. During this experience, the ISC provides assistance downloading/installing DirecTV and AT&T apps onto the customer's devices. Through this process, the ISC evaluates the customer's wireless needs prior to selling new accounts. Unlike ISC employees, COR retail store employees including the RSC and COS Sales Advocates assist customers who visit the stores. The evidence further establishes that COR retail store employees are primarily selling to existing customers.

As ISC employees perform outside sales, they drive company vehicles containing up to $10,000 inventory for which they are held accountable. Given that sales are conducted in residential homes, IHX employees are subject to various levels of governmental regulations and are required to complete a federally-mandated Mobility Order Receipt form allowing the residential customers three business days to rescind any purchase. This form is not required for retail store sales. ISC employees, unlike COR retail store employees, have sales goals, can track their performance, and are subject to discipline if sales targets are not met.

ISC employees have a "level 1A" authority in the OPUS point of sale system allowing them to offer various promotions, discounts, and credits not available to RSC or COS Sales Advocates selling in retail stores. ISC employees need no managerial approval from ISMs to offer these sales inducements. Unlike ISC employees, RSC employees cannot offer other discounts, waive fees, or offer credits and can only offer customers nationally advertised promotions which are automatically applied to the sales. Any attempt by an RSC to include additional inducements would be prevented by the OPUS system.

Throughout the hearing, the Union compared the duties of the ISSS employees to the duties of SSR, whose duties where taken over by RSCs when the SSR position was eliminated. At the time the SSR position existed, these employees greeted customers as they entered stores and put them in a queue to wait for the next available sales associate. The testimony revealed the Employer eliminated the SSR position because customers waiting in the queue became frustrated if SSR employees did not assist them.

The evidence establishes that each ISSS employee is vitally involved in dispatching ISC employees on their team to assignments at residential homes. Using data relative to customers of Sprint, Verizon and T-Mobile that is compiled into a field service computer system, the ISSS considers the following and other factors before assignment: 1) Starting location of ISC; 2) Type of DirecTV appointment; 3) Time of day; 4) Traffic pattern; 5) Resident's current wireless provider; and 6) the language needs of customers. While ISSS employees assign work using the field service computer system, each ISSS can develop their own methods to evaluate assignments.[14]

The Union maintained that both ISSS and SSR employees received inventory shipments. The evidence revealed SSR employees opened delivery boxes and scanned barcodes to log deliveries into retail stores' inventory. While ISSS employees scan Hub inventory into

[14] The testimony of ISM Mauricio Garcia Ross and former Orange footprint ISSS Sydney Tylucki provided evidence of ISSS deviation from the predictive score generated by the computer software.

the OPUS system, they have much more responsibility, as they have the same level of accountability for inventory as retail sales managers. Accordingly, they are subject to discipline for lost inventory. ISSS employees also check out Hub inventory to be used in ISC vehicles and maintain weekly truck audits. If an ISC's vehicle lacks inventory, the ISSS checks out more inventory to the ISC without prior managerial approval. While retail stores and Hubs have separate inventory, if a device is not available in Hub inventory, the ISSS contacts their respective ISM and Area Retail Sales Manager to approve the transfer of inventory. ISSS employees also use a tracking system to review customer trade-ins for accuracy. While RSCs may assist with inventory counts, only managers have the authority in OPUS to conduct an inventory count.

In addition, ISSSs manage company vehicle maintenance within their team's fleet, including scheduling maintenance, inspections, and repairs and maintaining vehicle records. They also prepare for the Hub's overall audits, which are conducted regularly by the IHX organization. In order to prepare for the audits, the ISSSs conduct weekly and monthly audits of Hub inventory. Unlike ISSS employees, the RSCs have no audit responsibilities. ISSSs also research state and local laws regarding solicitation permits and licensing, and on occasion are involved when a customer is dissatisfied with an ISC.

As previously described, RSC employees, unlike ISC employees, deal exclusively with customers that come into the retail stores. In an email to Mobility's Assistant Vice President of Labor Steven Frost dated April 10, 2018, Patricia Telesco, the National Union's Area Director District I, stated, "It is not a function of the RSC-(hence the word Retail in the title) - to do any cold calling and to force someone outside of the store, to do so is violating past practice and changing their working conditions."[15] In this same email, Telesco informed Frost that "….RSCs cannot be forced into doing cold calling, door knocking, or any other trolling for sales outside of the store." [16]

**ANALYSIS**

Unit clarification is the appropriate method "for resolving ambiguities concerning the unit placement of individuals who . . . come within a newly established classification of disputed unit placement." Union Electric Co., 217 NLRB 666, 667 (1975). The Board will view a new classification as already belonging in the bargaining unit (rather than being added to the unit by accretion) if that new classification performs the same basic work functions historically performed by unit employees. Premcor, Inc., 333 NLRB 1365 (2001); Developmental Disabilities Institute, Inc., 334 NLRB 1166 (2001 ). If, on the other hand, the Board finds that the Premcor test is not satisfied, it will add or "accrete" the new classification to the unit "only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted." CHS, Inc., 355 NLRB 914, 916 (2010), quoting Frontier Telephone of Rochester, Inc., 344 NLRB 1270, 1271 (2005), (internal quotation omitted). AT Wall Co., 361 NLRB 695, 697 (2014).

**A. Premcor Test**

In Premcor, 333 NLRB 1365 (2001), the Board concluded that in a unit clarification proceeding, once it is established that a new classification is performing the same basic

[15] Employer Exhibit 46.
[16] While on occasions RSC employees may volunteer to participate in a "table day" held outside of the store, Amy Nienhaus, Mobility's Assistant Vice President, testified that mileage reports disclosed that RSC employees spend less than 1% of their time outside of the store.

functions that an existing unit classification has historically performed, the new classification is properly viewed as remaining in the unit rather than being added to the unit by accretion. In that case, the unit description included production and maintenance employees, and the position of Operator I fell within the scope of the unit. The Operator I classification was being eliminated and the new classification, PCC, would perform essentially the same functions as the Operator I. All six of the PCCs selected by the employer were former Operator 1s or "spares" (cross-trained employees who could flex into jobs as needed) and had been members of the bargaining unit. The Board rejected the employer's contention that the PCCs were "technical" employees because more sophisticated computers permitted them to monitor more sections of the refinery at once and training required them to do so safely with appropriate discretion. Rather, the Board found that the employees in the newly created positions were performing the same basic function historically performed by members of the bargaining unit.

In Developmental Disabilities Institute, Inc., 334 NLRB 1166 (2001), also cited by the Union, the employer provided educational, social, and health-related services for developmentally disabled children and adults. The dispute arose when the employer created the new position of therapy assistant/psychology, and hired six individuals in this classification to provide one-on-one instruction for six children deemed to be too self-injurious and disruptive for them to be included in the regular classrooms. The therapy assistants/psychology generally performed the same duties that were performed by teachers and assistant teachers, such as greeting children at their school buses, escorting them to the classroom, monitoring and attempting to lessen the severity of their disruptive behaviors, recording behaviors on data sheets, and instructing them in other educational activities, including communication skills. The Board found that the therapy assistants/psychology were performing the same basic educational functions that had historically been performed by bargaining unit members and that they were appropriately included in - not accreted into - the existing bargaining unit, under the Premcor test.

In AT Wall Co., 361 NLRB 695 (2014), the employer, a metal products manufacturer, created a new department and four new job classifications for a new product line. Although there were similarities in the general manufacturing processes of the old and new product lines, and bargaining unit employees performed some of the work on the new product line, the Board found Premcor inapplicable because the employees in the four new job classifications produced an entirely different product using different processes under different working conditions that were not sufficiently related to the functions of employees in the other departments. 361 NLRB at 697-698. The Board also noted that the unit description in the collective-bargaining agreement grouped the classifications by department, and did not include the new department.

In Walt Disney World Parks and Resorts US., 367 NLRB No. 80 (2019), the Board determined that Premcor did not apply when the employer created a new job classification, Ride Service Associates (RSAs), for the then-newly introduced on-demand guest transportation system operated in partnership with Lyft, the ride-sharing mobile app. The Board distinguished the work functions of the RSAs from the unit classification of Bus Drivers

noting:

> Although RSAs and Bus Drivers (and PHHs) may all be engaged in driving vehicles that transport guests, this does not establish that they perform the same basic functions within the meaning of Premcor. As AT Wall teaches, the Premcor test does not compare employee functions at the broad level used by the Regional Director here. In that case, the Acting Regional Director essentially characterized both the Metalform employees and the Tubing and Stamping employees as engaged in "production and maintenance," AT Wall, 362 NLRB at 607, but the Board differentiated between them using a narrower analysis that relied on the specific types of products manufactured, the specific types of

> equipment used, and the training involved. Applying the AT Wall approach to defining the positions, the RSAs here drive different vehicles under different conditions, receive different training, and engage in different types of guest interaction than the Bus Drivers or PHHs.

Id, slip op. at 3.

I find that the Union's reliance on Premcor, Inc., 333 NLRB 1365 (2001) and Developmental Disabilities Institute, Inc., 334 NLRB 1166 (2001) is misplaced. The Union argues that like the classifications in Premcor and Developmental Disabilities, IHX employees perform the same basic functions historically performed by bargaining unit employees. I disagree. The Union's position that ISC employees perform the same tasks as RSCs, albeit in a different physical area with updated technology, is without merit. ISC employees, unlike RSCs, are assigned to visit residential customers at their homes unannounced and persuade the residential customer to abandon their wireless provider. The skills necessary to accomplish such conversions are different from the RSCs' skills. In that regard, RSCs interact with an established customer who has chosen to visit a COR retail store. In fact, the Union, in an email from Union Area Director Telesco to the Employer, acknowledged that RSCs do not perform outside sales work. ISC employees also work under varying regulations and authority relative to residential solicitations. In addition, ISC employees, unlike RSCs, primarily work outside of their offices and accordingly are assigned company vehicles, which carry significant inventory for which the ISCs are responsible. Moreover, ISC employees have separate sales goals and are subject to discipline if these goals are not met.

Similarly, the ISSSs perform different functions than the former SSRs performed, duties that were assumed by RSC employees. While both received inventory shipments and scanned them into a retail store's inventory account, the ISSSs have additional job tasks not performed by RSCs or formerly by the SSRs. Specifically, ISSSs dispatch ISCs to customer appointments, manage inventory and vehicles, prepare for and conduct audits, and occasionally resolve customer complaints.

Under these circumstances, I find Premcor inapplicable. While both ISCs and RSCs are involved in sales, the Board, as explained in AT Wall, 361 NLRB 695 (2014) and Walt Disney Parks and Resorts US, 367 NLRB No. 80 (2019), does not compare employee functions at the broad level. Here, the ISCs are functionally distinct from the RSCs, as they are performing outside sales under different working conditions, using different skills, and engaging in different interactions with customers. Similarly, the ISSSs perform many functions not performed by RSCs that require different skills. Thus, the new classifications cannot be properly considered as already in the unit. Rather, the positions can only be accreted if they have little or no separate identity or share an overwhelming community of interest with employees in the existing bargaining unit.

**B. General Accretion Analysis**

The Board has consistently followed a restrictive policy in finding an accretion because such a finding forecloses employees' basic rights to select their bargaining representative. Towne Ford Sales and Town Imports, 270 NLRB 311 (1984) *affd. sub nom*. Machinist District Lodge 190 v. NRLB, 759 F 2d. 1477 (9th Cir. 1985). The Board has stated that it will not, under the guise of accretion, compel a group of employees who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity to express their preference in an election. *Id.* See also Mohenis Services, Inc., 308 NLRB 326, 332 (1992), Melbert Jewelry Co., 108 NLRB 107, 110 (1969).

In addition, the Board in Mohenis, *supra* at 331, *citing* Safeway Stores, 256 NLRB 918 (1981) noted it had: …. "found the valid accretion only when the additional employees have little or no separate identities and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the pre-existing unit to which they are accreted." See also Ready-Mix USA, Inc., 340 NLRB 946, 954 (2003) *also citing* Safeway Stores.

In determining whether it is a valid accretion, the Board considers the following factors 1) interchange and contact among the employees; 2) degree of functional integration; 3) geographic proximity; 4) similarity of working conditions; 5) similarity of employees' skills and functions; 6) supervision; and 7) collective bargaining history. E. I. Dupont, Inc., 341 NLRB 607, 608 (2004) The Board usually views as "critical" the factors of employee interchange and common day-to-day supervision, and their absence will "ordinarily" defeat an accretion claim. Frontier Telephone, 344 NLRB 1270, 1271 (2005), *enfd.* 181 Fed. Appx. 85 (2d Cir. 2006).

**Interchange and Contact between IHX employees and Orange CBA bargaining unit employees**

In Towne Ford Sales, 270 NLRB 311, 312 (1984), the Board noted that "when examining the factor of employee interchange to determine whether accretion is appropriate, no weight is assigned based on an argument that interchange is feasible when in fact there has been no actual interchange of employees." The Board, when analyzing the accretion factor of employee interchange, distinguishes between temporary transfers and permanent transfers. As noted in Frontier Telephone, 344 NLRB at 1272, *citing* Novato Disposal Services, 330 NLRB 632 fn 3 (2000), the Board considers permanent transfers of employees to be a less significant indication of actual interchange than temporary transfers. Here, there is no evidence that Orange bargaining unit employees fill in or substitute for employees in the disputed IHX organization classifications of ISC or ISSS. Moreover, there is no evidence that ISC or ISSS employees temporarily substituted or performed the work of bargaining unit employees.

While the Union characterized the initial and subsequent staffing of the IHX organization as a transfer of bargaining unit employees to the IHX positions of ISC or ISSS, this is not supported by the record. Rather, individuals were placed into IHX positions through voluntary applications and the Employer's normal hiring process. The testimony establishes that prior to the IHX launch, Mobility followed normal staffing procedures for hiring all ISC and ISSS employees. Employees completed applications for posted positions on the AT&T's Career Path. Applicants were screened and interviewed like other non-unit internal applicants. If an employee who accepted an IHX position wished to return to the bargaining unit, they followed the same hiring practice. IHX employees have no right to automatically transfer back to a bargaining unit position.

Moreover, as the Employer aptly points out, the voluntary nature of the IHX staffing through the Employer's normal hiring process is distinguished and evidenced by the negotiated process used to transfer former SSRs to the position of RSC when Mobility vacated the SSR classification. In this negotiated process, every former SSR was offered the ability to transfer to a RSC position in the same retail store without going through the standard hiring procedure. A former SSR employee simply accepted the offer and was thereafter trained regarding RSC duties.

I find that the factor of employee interchange weighs against the accretion of ISC and ISSS employees into the bargaining unit. With respect to this critical factor, there is absolutely no evidence that IHX employees in the classifications of ISC or ISSS ever covered for or temporarily transferred into bargaining unit positions, including the RSC or COS Sales Advocate. Moreover, I conclude that any movement by former bargaining unit employees to the IHX organization in the classification of ISC or ISSS constitute voluntary applications as opposed to involuntary transfers. Finally, the evidence demonstrates that with respect to any situation where an IHX Hub is in a building housing a retail store, any contact between ISC or ISSS employees and bargaining unit employees is incidental. Rather, in Hubs located in retail buildings, the IHX is in a separate workspace. See NV Energy, Inc., 362 NRLB 14,17 (2015), which held incidental and irregular physical contact found insufficient to support accretion.

**Common day-to-day supervision between IHX employees in the positions of ISC and ISSS and Orange bargaining unit employees**

The testimony reveals that employees in the ISC and ISSS positions do not share day-to-day supervision with employees in the bargaining unit including RSCs and COS Sales Advocates. ISMs directly supervise IHX employees, including ISC and ISSS employees. These ISMs make decisions with respect to hiring, evaluating, discipline, and terminations. They also conduct staff meetings and coachings. ISMs have no supervisory authority with respect to bargaining unit employees, including RSCs or COS Sales Advocates. Similarly, Mobility's Retail Management does not exercise day-to-day supervision of ISC or ISSS employees. Finally, the evidence demonstrates that the IHX organization and Mobility's Retail Sales organization have separate management up until the seventh level of leadership.[17] As previously noted, this second critical factor in the finding of accretion is whether the day-to-day supervision of bargaining unit employees is the same in the group sought to be accreted. Towne Ford Sales, 270 NLRB 311, 311-312 (1984). In NV Energy Inc., 362 NLRB 14, 17 (2015), the Board, while noting the Regional Director set forth the applicable standard,

[17] In Passavant Retirement and Health Center, Inc., 313 NLRB 1216, 1218 (1994), the Board, in overruling the Regional Director's accretion finding, noted it disagreed with the significance accorded by the Regional Director to the fact that both groups of employees have common upper level-supervision.

nevertheless reversed his findings of an accretion based on the lack of day-to-day supervision, along with the absence of employee interchange. *See also*, Compact Video Service, 284 NLRB 117, 120 (1987).

I find that the lack of common day-to-day supervision between IHX employees including ISC and ISSS employees and bargaining unit employees including RSCs and COS Sales Advocates weighs against accretion.

**Degree of functional integration.**

In Frontier Telephone, 344 NLRB 1270 (2005), the Board reversed the ALJ's finding of accretion despite his conclusion that certain factors, including the functional integration of the employer's call center, supported accretion. The ALJ noted that both groups worked "in tandem" in responding to customer inquiries regarding internet services. The Board concluded that this and other factors "do not outweigh the factors that mitigate against accretion." *Supra* at 1271-1272. [18]

Here, the IHX organization was established as an independent sales platform designed to gather wireless customers of the Big Three, namely Verizon, Sprint and T-Mobile. ISC employees arrive at homes of these other wireless providers' customers to persuade them to switch to Mobility. Unlike the IHX organization's customers, the customers of the COR retail stores initiate the contact by going to the retail store. The operation of the IHX organization and retail stores do not rely on each other for the completion of sales.

[18] In his evaluation of the integration of operations, the ALJ stated functional integration of operations means in the context of an accretion that the "work of one group of employees is functionally dependent upon or closely related to that of a pre-existing unit." 344 NLRB 1270, 1271 fn. 39 (2005), Progressive Services Die Cop., 323 NLRB 183, 186 (1997).

While some IHX Hubs are housed in buildings which also house retail stores, the IHX business operates separately from the retail stores and each maintain separate workspaces and inventory.[19] IHX employees and the retail employees, such as RSC and COS Sales Advocates, have different management, equipment, systems, sales targets and different access to the OPUS system.[20] I find that the factor of degree of functional integration between ISC and ISSS employees and Orange bargaining unit employees does not weigh in favor of accretion.

**Geographic proximity of IHX employees and Orange bargaining unit employees**

In NV Energy, Inc., 362 NLRB 14, 17 (2015), the Board held that incidental physical contact between employees in the existing collective bargaining unit and the group of employees sought to be added was insufficient to support an accretion. Here, even in the limited examples of IHX Hubs being located in the same building as a retail store, the IHX employees have distinct work areas, often with separate entrances. At most, there are incidental passing interactions between IHX and retail employees. I have also considered the testimony that on limited occasions, an ISC may pick up a device at a retail store. The evidence demonstrates that this infrequent contact happens only after respective managers (ISM and Area Retail Sales Manager) approve the transfer of inventory.

The evidence demonstrates that IHX organization employees and retail employees work at geographically separate locations. ISC employees primarily work in customer's homes, ISSS employees primarily work in their respective Hub, and RSC and COS Sales Advocates primarily work in retail stores.

[19] The testimony that on occasion retail store inventory may be transferred to the Hub upon managerial approval is insufficient to establish functional integration.

[20] As previously described, any attempt by an RSC to include additional inducements would be prevented by the OPUS system.

I find the incidental contact between bargaining unit employees and IHX employees do not favor accretion, particularly in the absence of the two critical factors of interchange or common day to day supervision. NV Energy, Inc., 362 NLRB 14, 17-18 (2015).

**Similarity of working conditions**

While IHX employees and the Orange bargaining unit employees, including RSC and COS Sales Advocates, are involved in the sale of wireless products and related services, the work performed by ISC and ISSS employees is uniquely different from that of Orange bargaining unit employees. As addressed above, one significant difference between the work of ISC employees and RSC and COS Sales Advocates is the location of the sale and the customers to whom they are selling. ISC employees, as guided by ISSS employees, arrive unannounced and uninvited at residential homes and attempt to sell accounts to new customers. On the other hand, retail employees assist customers who visit the stores and who are primarily existing customers. In addition, as ISC employees perform outside sales, they drive company vehicles containing up to $10,000 inventory for which they are held accountable. As sales are conducted in residential homes, IHX employees are subject to various levels of governmental regulations which are not present at COR retail stores. ISC employees have the authority to offer promotions, discounts and credits not available to RSC or COS Sales Advocates selling in retail stores.

ISC compensation and commissions are based on three categories: Tier 1 (Wireless Service); Tier 2 (Data Devices); and Tier 3 (Protection and/or Insurance). ISC employees have targets in each of these categories. ISC employees' start times are established based on the start time of DirecTV technicians. ISC employees handle their own time to maximize appointments and have no set break or lunch times. The testimony establishes that ISCs frequently attend follow-up appointments outside of regular business hours. ISC employees are subject to a progressive disciplinary policy which is the same as non-represented Mobility employees.

ISSS employees are paid on an hourly basis and are eligible for overtime. ISSS employees are eligible to work from home when an ISC needs assistance. They manage their own start time, breaks and lunches.

Retail stores are generally open seven days per week and usually a retail store manager or assistant manager is always available. Under the Orange CBA, Article 19, Section 10, RSC employees receive a pay differential for any hours they are designated as a temporary manager on duty (MOD). RSC employees work assigned shifts based on seniority and preference. They clock in and out. RSC's compensation structure and commission plan is governed by the 2019 Sales Compensation Plan Policy, Retail Sales Associate. RSCs have different sales targets than ISC employees.

As reflected above, the IHX employees' working conditions vary substantially from Orange bargaining unit employees and accordingly, this factor weighs against accretion.

**Similarity of Employees Skills and Functions**

A comparison of the skills and functions of IHX employees to those of the bargaining positions of RSC and COS Sales Advocate demonstrate that the IHX employees' skills and functions are related, but not equivalent. On a basic level, ISC and Retail employees sell wireless products. Nevertheless, the former operates independently in an environment where selling skills need to be more finely tuned to translate a cold call into a sale. With respect to RSCs, as detailed above, their clientele are generally existing customers who present themselves at a retail store. Moreover, ISC employees, unlike RSCs, must be able to manage their own schedules and decide on specific unique inducements to maximize sales opportunities and make target goals. In contrast, RSC employees have set schedules and little leeway with respect to the tools they utilize in order to facilitate sales. Accordingly, while I see a similarity in the general goal of generating sales, the differences in ISC skills and job functions compared with those of retail employees weighs against accretion.

With respect to ISSS employees' skills and functions, compared to RSC or former SSR employees, I find that the software employed by the ISSS, the independence necessary to successfully pinpoint customers, and the overall responsibility for vehicle and maintenance audits and compliance demonstrate a much higher level of independent decision making. Accordingly, I find that an evaluation of the differences in ISSS skills and job functions, compared with those of RSC or former SSR, weighs against accretion.

**Collective Bargaining History**

Mobility's Associate Vice President Amy Nienhaus testified about the wireless Industry's evolution and the historical unrepresented status of outside sales positions within the Orange CBA footprint. She testified that while Mobility employed outside sales employees since inception, they never have been part of the Orange CBA. [21]

Nienhaus noted when Cingular acquired AT & T Wireless (ATTW) in 2004, the Union represented approximately 20,000 Cingular employees under the Orange, Black, Green and Purple collective bargaining agreements. In contrast, none of the ATTW employees were represented. Thereafter, using voluntarily recognition agreements, the Union organized

[21] These outside sales employees included Small Business Advisor II, Business Account Executive, National Dealer Account Executive, Retail Account Executive, Door to Door Sales, Account Executives (Global Market Account Executives, Corporate Market Account Executives, Small Business Account Executives and GEM Account Executives handling government, education and medical entities).

thousands of ATTW employees within the footprint of the Orange, Black, Green and Purple collective bargaining agreements. Nienhaus testified that since 2004, Mobility administered the Orange CBA with positions "inside the four walls" of the retail store, while outside sales positions were not covered under the agreement.

The Union contends that the "Outside Premise Sales Representative" exclusion in the Orange collective bargaining recognition clause referred to a former Cellular One job classification. While Union witness Patricia Telesco testified that she believed Cellular One had such a title, she also acknowledged that she was not present in Washington DC in December 2000 when the parties reached the final agreement on the first Orange CBA. [22] Contrary to the Union's position, I find that the phrase "outside premise sales representative" does not refer to a specific classification but rather is a general exclusion of employees engaged in outside sales.

During Orange collective bargaining in 2009, the Union proposed to delete the outside sales exclusion from Article II, Section 1. Mobility rejected the proposal and the exclusion remained in the collective bargaining agreement.

I conclude that the parties have consistently administered the Orange CBA to exclude employees who engaged in outside sales.[23] On this basis, I conclude that the factor of collective bargaining history does not weigh in favor of accretion.

**CONCLUSION**

Having previously concluded that the disputed ISC and ISSS employees are not already a part of the Orange bargaining unit under the Premcor test, and having evaluated various

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[22] Nienhaus testified that her research of Mobility's HR database confirmed that since 1977, neither Mobility nor its predecessor ever used the title "Outside Premise Sales Representative."

[23] In contrast, outside sales positions has been specifically included within the Purple CBA.

accretion factors, I conclude that the IHX employees have retained their separate group identity and do not share an overwhelming community interest with the existing Orange bargaining unit. At Wall Company, 361 NLRB 695 (2014).

As the criteria to support an accretion has not been met, I will clarify the unit and exclude the IHX positions of ISC and ISSS. E.I. DuPont, 341 NLRB 607, 609 (2004). [24]

## ORDER CLARIFYING UNIT

The collective-bargaining unit is clarified to exclude ISC and ISSS employees as follows:

### Unit

> **Included:** The Company recognizes the Union as the sole collective bargaining agent for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment for those covered employees in CWA Districts 1, 2-13, 4, 7, and 9 as dated February 12, 2017. The term covered employee and/or employees as used in this agreement shall mean, those employees within the job titles set forth in Appendix A.
>
> **Excluded:** Outside Premise Sales Representatives, including job titles within the AT & T Mobility Home Solutions Department, and additionally including but not limited to Integrated Solutions Consultants and Integrated Sales Support Specialists and all employees exempt by the National Labor Relations Act.

[24] In the alternative, the Union, relying on Gitano Group Inc., 308 NLRB 1172 (1992), argues that the Union should be found to be the collective bargaining representative of a separate bargaining unit of ISSSs and ISCs. In Gitano, the Board stated that, when an employer transfers a portion of its employees at one location to a new location, the new facility is presumptively a separate unit. If the presumption is not rebutted, the Board applies a simple fact-based majority test to determine whether the employer is obligated to recognize and bargain with the union as the representative of the unit at the new facility. If a majority of the employees in the unit at the new facility are transferees from the original bargaining unit, the employer is obligated to recognize and bargain with the union as the exclusive collective-bargaining representative of the employees in the new unit. Here, employees were not transferred by the Employer. Rather, they applied for newly created positions in the Employer's new sales organization. The evidence established that former bargaining unit employees did not receive a hiring preference and that numerous bargaining unit applicants did not receive offers from the IHX organization. Moreover, as detailed earlier in the decision, the newly created positions were functionally distinct from their bargaining unit positions. Thus, I do not believe that Gitano is applicable to the facts of this case.

**RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, you may obtain a review of this action by filing a request for review with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations and must be filed by **September 8, 2020**.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated this 25th day of August 2020.

Nora McGinley

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